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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>JASON WESLEY GLAZE et al.,<br>Defendants and Appellants. | A139729<br><br>(Contra Costa County<br>Super. Ct. No. S1214840) |

Jason Wesley Glaze, Justin Glaze, and James Nicholas Anaya were charged with a number of offenses against James Reid, Sr. (James Sr.), James Reid, Jr. (James Jr.), and David Reid (David). Only Justin Glaze (Justin) was found by the jury to have committed felony assault with a deadly weapon (Pen. Code,[1] § 245, subd. (a)(1)) on James Sr., while Jason (Jason) and Anaya were found to have committed misdemeanor assault (§§ 240, 241, subd. (a)). Only Jason was found by the jury to have committed felony assault with a firearm on James Jr. (§ 245, subd. (a)(2)). Only Anaya was found to have committed felony assault with a deadly weapon on David Reid, while Justin and Jason were found to have committed misdemeanor assault. Each defendant was also found guilty of committing a felony for the benefit of a criminal street gang (§ 186.22, subd. (a)). The trial court found that each defendant had served a term in state prison following conviction of a felony: Justin for armed robbery, Jason and Anaya for felony assault.

[1] Statutory references are to the Penal Code unless otherwise indicated.

Jason was sentenced to state prison for ten years, Justin to seven years, eight months, and Anaya to five years.

Anaya contends that none of his convictions is supported by substantial evidence. Justin contends that his gang conviction and misdemeanor assault convictions suffer from the same defect. Jason contends there is no evidence that the firearm he was convicted of using was operable, thus requiring reversal of that charge.

Justin, joined by Anaya, contends the trial court committed misconduct when it "interfered" in the questioning of the defense gang expert.

The remainder of the contentions pertain to the theory of self-defense that was rejected by the jury. Justin, again joined by Anaya, argues the trial court abused its discretion in excluding evidence tending to show that David had a violent character and was the aggressor. Jason, joined in whole by Anaya and in part by Justin, asserts the trial court erred by prejudicially misinstructing the jury with CALCRIM Nos. 3471 and 3472. Lastly, Justin contends his felony assault conviction on Reid, Sr., and his misdemeanor assault conviction on David Reid must be reversed "for the additional reason that the prosecution failed to prove beyond a reasonable doubt that Justin did not act in lawful self-defense or defense of others."

We conclude that none of these contentions has merit, and therefore affirm.

## BACKGROUND

This narrative does not, except where necessary for clarity and comprehension, take account of co-defendants tried separately, or charges for which the jury returned acquittals or was unable to reach a verdict. The evidence received at defendants' trial supports the following recitals:

This prosecution was essentially about the interactions of two families. One is the Reid family, James, Sr. and his sons, James, Jr. and David. The second family is composed of the appealing defendants, who are brothers. There is a third collective actor, a gang calling themselves the Bay Boys.

The Reids, the defendants, and the Bay Boys all had ties to a section of Bay Point (formerly West Pittsburg) in Contra Costa County. Sheila Brown has lived at 39 Bay Drive for decades. James, Jr. and David have lived next door (43 Bay Drive) for a couple of years. The defendants were well known to Brown, who frequently saw them "hanging out" at a nearby home on Bay Drive. Brown knew of the Bay Boys, but did not believe defendants were members or claimed to be members. Brown observed no problems between the Reids and defendants until the evening of July 30, 2012, when the Reids and defendants got into the altercation that led to this prosecution.

Brown was inside her house when she heard yelling outside. She went outside and saw two groups of people angrily yelling at each other across the street. Brown remembered seeing the Glaze brothers—but not Anaya—yelling from within one of the groups. James Jr. was among the other group, as was his girlfriend and mother. After about ten minutes, the groups were still arguing and exchanging curses when James Sr. drove up. His son David was with him. James Sr. exited his vehicle with a golf club, while David had what Brown described as "a bat or wooden stick." Brown testified that after the two Reids had "headed off into the group of kids," she, not wishing to be involved, went back inside her home. The last image Brown remembered was James Sr., running toward the group with defendants, holding the golf club "like he was going to hit somebody, but I didn't see him swing it." David followed, holding his wooden bludgeon "like if it was a bat, he was going to swing it." Brown saw no weapons in the group with defendants.

David testified that the group defendants hung out with across the street was known as, and referred to throughout the neighborhood as, the Bay Boys. David's relationship with the Bay Boys, which had at least 15 members, was just "a hi-and-bye basis." James Sr. described the casual relationship with defendants: "once in a while we would associate. [¶] . . . [W]e work on cars all the time and . . . they would come over

and ask to borrow tools."[2] He too testified that the defendants were members of the Bay Boys. So also did James Jr.

All of the Reids testified about a pair of recent incidents. The first was on July 29, when one of the two Bolter brothers, Gary and Jeremy, who were staying at the Reid house, yelled at a neighbor named Brian Lewis (who lived with his uncle Winston at 46 Bay Drive) to slow down while driving through the neighborhood. Brian produced a mallet from his vehicle, and, after screaming at each other, the two exchanged blows. Then, the next day, July 30, a neighbor, codefendant and Bay Boy Kyle McDonald, who was upset over the incident, approached James Sr., "told us to beware because they were coming after us," and struck James Sr. with his fist. A group of Bay Boys congregated outside the Reid house. One of them was armed with a handgun, one with "a rifle pump action BB gun." Another, brandishing a wooden club, repeatedly charged onto the porch of the Reid house, pounded the club on the door, and stated "we needed to move out or they were going to kill us." The Reids were sufficiently worried that they called the police, who dispersed the crowd. At the urging of police, the Reids left the premises and temporarily relocated to James Sr.'s house.

There were reiterations of the threat: James Sr. testified about "people stopping my daughter at the store telling her we got to move and people coming up to us saying we're going to be getting it." James Sr. agreed that, if necessary, he would surreptitiously speak to police at designated locations away from his house

James Jr. testified that less than an hour later, he was back at 43 Bay Drive, packing his car to leave, because he and family felt threatened, when he was attacked and beaten (with fists only), but he did tell police and his father that he saw one of his attackers carrying a revolver. He recognized one of the attackers as codefendant and Bay Boy Thomas McCaslin. James Jr. notified his father, who arrived within minutes.

David was at James Sr.'s home (located less than a mile away) when they heard that James Jr. "got jumped." David and James Sr. ran to their car, David grabbing a bat

[2] James Sr. is related to Jason: "[H]is mother or grandmother or whatever is married to my wife's uncle."

on the way. As they drove up to 43 Bay Drive, they observed what David described as "a lot of Bay Boys" in "the street and in front of houses." David thought the people were "celebrating" because "they are all jumping around smiling." A beer can was thrown at the windshield.

James Sr. testified that when he saw the street had been blocked with a large vehicle, "I thought my son was going to be dead. [¶] Because I have seen this action happen prior on that same street with other people and when streets get blocked off, bad things happen. [¶] Because maybe a month or so prior to that I was in another area and we were driving and there was a vehicle just like that one but blocking a road and we turned around and had to go down another street and that night we heard on the news that somebody got jumped and shot right there and they kind of explained it that the road was blocked. . . . So it's just—in my mind, with that many people there and the road being blocked, I knew that they were blocking it for a reason so my son couldn't get out with his car."

James Sr. testified that individuals were "coming toward me" even before he could halt the vehicle. He grabbed a golf club from the back seat, and hit "the closest person coming toward me" with the golf club. "I was . . . being hit from behind at the same time." As James Sr. was being pummeled, he saw his golf club in the hands of Justin, who "pulled it back like he was swinging a baseball bat and he swung it at me." James Sr. was hit "in my left kidney or left side of my hip."

David testified that after he got out of the vehicle, "I got charged, so I had to charge them" and then "we were fighting. [¶] . . . it was just a big brawl." He never used the bat, which ended up in the hands of someone named Joey (codefendant and Bay Boy Joseph Ramos), who swung it at David's head. David parried the blow, "took the bat from Joey and hit him across the face with it." In the ensuing melee, David was punched; hit in the back with a golf club by Anaya; hit across the chest with a baseball bat; stabbed in the head and shoulder by codefendant and Bay Boy Shane Hernandez; and struck at least twice on the head with bricks.

Dazed, James Sr. somehow made it into the house. The fight ended when at some point David saw Jason pointing a gun at James Jr., someone yelled "Gun!", and the attackers fled.

James Jr. was cleaning up in his bathroom from the thumping when his father and brother arrived and the fight started. James Jr. looked outside and saw "my brother and my dad fighting" with "the Bay Boys." He grabbed a baseball bat to try to help. "I came out and . . . got a gun pulled on me" by Jason, which caused James Jr. to retreat to the house.[3] He saw Justin hit James Sr. with a golf club.

At the same time that James Jr. called his father, his fiancée made "a frantic phone call" to her mother, Ms. Lovelock.[4] Ms. Lovelock drove to Bay Drive, where she observed a group of 15 to 20 men demanding that one of her sons come out of the house so that 'they could deal with my son, and then basically whatever was happening with James [Jr.] and my family at 43 Bay Drive would cease." When James Jr. emerged from the house and tried to get into a car to leave, "he was bum rushed by . . . seven of the 15 to 20 guys. He was chased around . . . [and] . . . fell at some point, the people started kicking and hitting him." Ms. Lovelock saw James Jr. make it back to his house, and then saw James Sr. and David arrive and "[get] into a scuffle with several of the guys." Ms. Lovelock did not see whether either James Sr. or David had anything in their hands. Nor did she catch details of the ensuing melee: "I just saw a bunch of fighting, just a lot of individuals fighting. And I know David was there and James Sr. was there, and they were in the altercation with several guys." She did not see any weapons. After she yelled, "I'm calling 911," the attackers scattered. Ms. Lovelock could not identify any of the 15-20 attackers.

Lucas Winston, who lived at 46 Bay Drive, testified that Jason hung out with the Bay Boys. He also heard the threats against the Reids ("We're going to get you," "This is all about punishment now"). He described the start of the melee of July 30th: "The

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[3] James Jr. told an investigator shortly after the fight ended that *two* of his attackers had guns—Jason and codefendant and Bay Boy Shane Hernandez.

[4] Ms. Lovelock is also the mother of the Bolter brothers.

two individuals inside the vehicle jumped out . . . . I noticed one of them had a golf club and the other had what seemed to be a hammer handle. And they . . . ran across the street and attacked the larger group," that is, the man with golf club swung with it and hit someone. The larger group "took the weapons and retaliated," that is "descended upon them. [¶] It was a mob rush. Most of the individuals, I would say at least ten of them, just went right at the two individuals and started . . . [¶] . . . attacking, swinging away at them." Winston thought he saw "an arm [with a handgun] coming out of this mass of bodies," but he could not provide specifics. The "two individuals," James Sr. and David, were defending themselves while "backing up, trying to get to the house 43 Bay."

James Jr.'s fiancé, Amanda Bolter, testified that "We had to leave because there was people trying to come to the house because they were angry so . . . we were leaving to escape." After James Jr. was beaten, Bolter observed the arrival of James Sr. and David. Her version was that neither had a weapon and that it was "the males that ran toward them . . . that . . . engaged in beginning the . . . battle." Bolter did not observe much after that because she was tending to her small son.

The two incidents on July 30 occurred within less than one hour.

The emergency room physician who treated David and James Sr. testified concerning the extent of their injuries after the fight.

The jury heard considerable testimony from Deputy Sheriff Marchese. The testimony was in two parts, described by the trial court in these terms: "Counsel for both sides . . . have agreed that the next witness, Deputy Marchese, will actually provide testimony . . . in two portions. [¶] The first portion will concern any testimony that he might give concerning his investigation of cases, activities as a police officer per se. [¶] The second portion of his testimony may include his rendering of what is commonly called expert testimony concerning the gang-related allegations in the indictment." In the initial portion of his testimony, Deputy Marchese testified as to various encounters he had had with the defendants. These included the defendants associating with other members of the Bay Boys and the arrest of Jason after the melee.

In the second portion, Marchese testified as follows:

He first started patrolling the Bay Point area in 2003, when there were already multiple gangs operating. In addition to his formal training and education on the subject of gangs, Marchese has dealt with "over thousands" of gang members "over the last 15 years." On his own, and after speaking with other officers, Marchese has identified 10 to 15 individuals who are members of the Bay Boys.

After extensive voir dire on his qualifications, Marchese was accepted by the court as an expert as to "the criminal street gang allegations" and "matters that are relevant to the Bay Boys." He then testified concerning the history and size of the Bay Boys: they have about 10 to 15 members, and, "because of their age and a few other factors," evolved from the "West Side Pitt guys." "[M]ost of them . . . are either related or they went to school [together] or both." "They use[] a hand sign of a 'W,' " and that initial, and also the initials "WSP," figure in their characteristic tattoos, as do "Bay Boys" and "Shore Acres" (the name of "a housing area" that is "unique to the Bay Boys").

Marchese further testified that the Bay Boys' rival is the "Vario Northern Structure . . . a Norteno gang that was integrated in the Shore Acres area at this time." The Bay Boys are affiliated with the CoCo Boys, which Marchese characterized as a "custodial gang," meaning it operated inside state prison. The primary activities of the Bay Boys was the sale of narcotics (mostly methamphetamine), possessing firearms, and maintaining influence in the neighborhood "by means of violence or intimidation."

Marchese elaborated on why a gang has "to have intimidation . . . over the neighborhood for many reasons. [¶] One obvious reason is not to be overtaken by another gang. No. 2, not to be ripped off by another gang. No. 3 is to maintain that area, to be able to sell your narcotics, although the Bay Boys . . . sell throughout the county, not just Bay Point. And No. 4, the more influence you have on people in the neighborhood by means of violence or intimidation, several things can happen. You could have less people reporting crimes, more people staying away from the Bay Boys and letting them do their thing."

As for violence, it brought particular benefits within the gang: "violence . . . promotes them inside the gang. It shows their commitment to a gang; if you are willing

to show violence, you not only further yourself inside the gang, but it furthers the whole gang itself." Moreover, "the whole gang benefits from that because they [the neighborhood] know that the gang is capable . . . of doing something that they wouldn't want to be a part of, which would be the violence." And, according to Marchese, members of the Bay Boys "benefit by using violence toward non-gang members." The Bay Boys have not been "formally prosecuted as [a] . . . criminal street gang."

Analyzing his history, Marchese concluded that Justin was a member of the Bay Boys since 2008. Jason and Anaya, he concluded, were also members, since the commission of a 2007 felony assault and home invasion. A 2009 search found Justin and Anaya in a residence with a sawed-off shotgun and seven other firearms, together with paperwork bearing Anaya's name, a tub of a substance "frequently used to cut methamphetamine"; and a digital scale and "packaging." Anaya was also in possession of a vehicle in which was found methamphetamine and another weapon.

Marchese recounted how, in 2011, officers made a traffic stop of a vehicle driven by Anaya, in which a half pound of methamphetamine, a half pound of marijuana, and $17,140 in cash was found. Found with the keys to the vehicle were keys to an empty trailer that had been under observation by police. Anaya and other Bay Boys were seen coming and going from the trailer. When the trailer was searched, officers discovered a half pound of marijuana, more than a pound of methamphetamine, a scale, and "material commonly used to process methamphetamine" for street sales.

Based on a number of factors, Marchese gave his opinion that Anaya was not only a member of the Bay Boys, he was an active participant in the gang. And a very important one: "Mr. Anaya, in my opinion, is the one who supplies most of the drugs for his gang, the Bay Boys. And that's been confirmed by my arrest with [*sic*] him, contacts with him, by speaking to other members of the community . . . , speaking to other officers, and speaking with informants." "And those contacts there alone and also with other contacts and arrests he's had involving violence, all of those things, the drug dealing, the amount[s] of money he has carried in the past, . . . the firearms and just the other basic characteristics that go along with gang culture; in my mind there is no

question that he was a member of the Bay Boys and an active participant in those crimes" and the events of July 30, 2012.

The same was true of Jason Glaze: he was "an active participant in the gang" and in the events of July 30. And also for Justin: "he is an active participant, that participated in that incident on . . . Bay Drive of the Bay Boys street gang." "It was a matter of the Bay Boys retaliating against what was a threat or insult and the Mr. Glaze, Justin, he partaked [*sic*] in that willingly . . . to further himself within . . . the gang."[5]

Deputy Marchese was asked: "In your expert opinion, is one or more of the primary activities of the Bay Boys the commission of any of the criminal acts listed in Penal Code section 186.22(e)?" He answered: "Sales of the narcotics, transportation of narcotics, . . . possession of a firearm. . . . [¶] Along with thefts and robberies." Marchese believed that "the felony conduct here is gang related."

For the defense, Sharon Elias testified that she knew Jason for his entire life, and he was not a member of either the Bay Boys or any other gang.

Jesse De La Cruz, a former gang member and an expert on gangs, testified that the Bay Boys did not qualify as criminal street gang. It followed that none of the defendants was "an active participant . . . on July 30, 2012," or was "acting to facilitate or promote a gang." De La Cruz admitted on cross-examination that he disagrees with the legal definition of gang, which he believes is "arbitrary" and "unjust." He did concede that, "under the law," the defendants had "engaged in a pattern of criminal activity," that it was "an ongoing association," and thus it did meet the legal definition of a criminal street gang. What happened on July 30 was not a gang crime.

Another expert on gangs, Mark Harrison, also testified that the Bay Boys did not qualify as a criminal street gang. Like De La Cruz, Harrison testified at length as to why he disagreed with Deputy Marchese on this point. And like De La Cruz, Harrison

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[5] Deputy Marchese expressed the same conclusion for the other Bay Boy codefendants. He also identified as Bay Boy members or associates persons not named in the indictment or involved in the events of July 30, 2012.

concluded that the events of July 30 were not committed for the benefit of a gang. Harrison did concede on cross-examination that "James Anaya's primary activities are the sale of methamphetamine."

None of the defendants testified on his own behalf.

## REVIEW

### The Gang Membership Convictions Are Supported by Substantial Evidence

Each defendant was convicted of violating subdivision (a) of section 186.22, which provides: "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years." This statute proscribes " 'active gang participation where the defendant promotes or assists felonious conduct by the gang. It is a substantive offense whose gravamen is the participation in the gang itself.' " (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930.)

"The elements of the gang participation offense in section 186.22(a) are: First, active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; second, knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity; and third, the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang." (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1130.)

Subdivision (e) of section 186.22 defines "pattern of criminal gang activity" as "the commission of, attempted commission of, conspiracy to commit, or solicitation of, . . . or conviction of two or more of the following [33] offenses . . . ." Subdivision (f) of section 186.22 defines "criminal street gang" as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in

paragraphs (1) to (25), inclusive, or (31) to (33),[6] inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity."

Justin, joined by Anaya, contends that his respective conviction under section 186.22 is not supported by substantial evidence that he actively participated in a criminal street gang because the Bay Boys were not shown to meet the statutory definition of a criminal street gang. The supporting reasoning is that "the testimony of Jesse De La Cruz and Mark Harrison, two defense experts on gangs, as well as the testimony of lay witnesses called by both the prosecution and the defense overwhelmingly established that the Bay Boys is nothing more than a small group of ten to fifteen young men who are family members, have been neighborhood friends from an early age, and who have a criminal history. They do not act in the way a gang would act and do not meet the factors used by law enforcement to validate [*sic*] a gang," specifically, "the Bay Boys do not have a color, do not use graffiti or social media to advertise, brag, or recruit new members, and do not claim or protect a particular turf. There are no unique signs or tattoos specific to Bay Boys." "The only opinion that Bay Boys is a criminal street gang was elicited from Deputy Marchese," whose testimony was unreliable and "not . . . competent evidence" of what was the purported gang's "primary activities." Lastly, "as both defense experts De La Cruz and Harrison, testified, the occasional criminal acts identified by Marchese were not undertaken to benefit a gang but to make money for the individuals doing the crimes; there was no nexus between the particular incidents and the group as a whole."

These arguments are to be evaluated according to well-established criteria.

"To assess the evidence's sufficiency, we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime . . . beyond a reasonable doubt. . . . In applying this test, we review the evidence in the light

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[6] Excluded are counterfeiting; carrying a concealed firearm; improper use of access cards, account information, or personal identifying information; and wrongfully obtaining Department of Vehicles documentation.

most favorable to the prosecution and presume in support of the judgment the existence of every fact the [trier of fact] could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. . . .' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the [trier of fact's decision.] [Citation.] [¶] The same standard governs in cases where the prosecution relies primarily on circumstantial evidence. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

The use of expert testimony on gangs "is well established" (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370), and can be sufficient proof of the gang's primary activities. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324; *People v. Gardeley* (1996) 14 Cal.4th 605, 620.) "In general, . . . expert testimony concerning the culture, habits, and psychology of gangs is permissible because these subjects are 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' " (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506.) "Likewise, an individual's membership in a criminal street gang is a proper subject for expert testimony." (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1464.) A gang expert may testify regarding the hearsay which is the basis for his opinion, so long as the hearsay is competent, meaning that it "is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions" and is "reliable." (*People v. Gardeley*, *supra*, at p. 618.) Examples of competent hearsay are "conversations with gang members as well as with the defendant," "the expert's personal investigation of past crimes by gang members," and "information about gangs learned from the expert's colleagues or from other law enforcement agencies." (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1223, fn. 9; see also *People v. Gardeley*, *supra*, at p. 620.)

It is important to note what is not at issue. There is no claim that the trial court abused its discretion in designating Deputy Marchese as an expert witness. Although

Justin goes right to the edge of saying Marchese should not have been accepted as an expert, he made no such objection at trial. So, we are asked to hold that Marchese's testimony was categorically inadmissible or unworthy of any credibility—in short, that Marchese's testimony was not good enough. The unstated premise of Justin's argument is that Marchese's testimony was incompetent and unreliable because it was contrary to the greater amount of evidence presented by the defense. The premise is easily rejected.

Substantial evidence has never been synonymous with the number of witnesses pro or con. "The mere number of witnesses on one side or the other is immaterial." (*Fowden v. Pacific S.S. Co*. (1906) 149 Cal. 151, 161.) The principle is now codified in Evidence Code section 411. (See also *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884–885 & fn. 8; 3 Witkin, Cal. Evidence (5th ed. 2012) Presentation At Trial, § 101, p. 157 ["The same rule applies to the testimony of expert witnesses."].) "Witnesses are not counted, but rather their testimony is weighed." (*Shannon v. Mt. Eden Nursery Co.* (1933) 134 Cal.App. 591, 592.) And it was for the jury to do the weighing. (See Evid. Code, § 312, subd. (b) ["the jury is to determine the effect and value of the evidence addressed to it, including the testimony of witnesses"].) Not us: "A reviewing court neither reweighs evidence nor reevaluates a witness's credibility." (*People v. Lindberg* (2008) 45 Cal.4th 1, 27; see *People v. Guerra* (2006) 37 Cal.4th 1067, 1129 [no reweighing].)

The jury was instructed with CALCRIM No. 3530 that "You are the sole judges of the evidence and believability of witnesses," and with CALCRIM No. 226 that "You alone must judge the credibility or believability of the witnesses. . . . You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe." CALCRIM No. 301, mirroring Evidence Code section 411, told the jury that "The testimony of only one witness can prove any fact." The jury was also given CALCRIM No. 302, that in evaluating conflicting testimony "What is important is whether the testimony . . . convinces you, not just the number of witnesses who testify about a certain point." The same instruction told the jury: "Do not simply count the number of witnesses who agree or disagree on a point and accept the

testimony of the greatest number of witnesses." And, concerning expert witnesses, the jury was instructed with CALCRIM 332 that "you are not required to accept them as true and correct. The meaning and importance of any opinion are for you to decide. . . . You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence. [¶] If the expert witnesses disagreed with one another, you should weigh each opinion against the others."

There is no reason to believe the jury did not follow these instructions. It obviously deemed Deputy Marchese's testimony more credible than that from the defense experts. The unstated essence of Justin's contention, that the jury should have believed the defense experts, must fail because our power does not extend to overturning the jury's determinations of credibility and worthiness. (*People v. Lindberg*, *supra*, 45 Cal.4th 1, 27; see *People v. Guerra*, *supra*, 37 Cal.4th 1067, 1129.) In sum, Deputy Marchese's testimony as credited by the jury is substantial evidence that the Bay Boys were a criminal street gang; that the primary activities of that gang were as described by him; that Justin and Anaya were members of that gang; and that the actions of Justin and Anaya were undertaken to benefit that gang. (E.g., *People v. Vang* (2011) 52 Cal.4th 1038, 1048; *People v. Sengpadychith*, *supra*, 26 Cal.4th 316, 324; *People v. Gardeley*, *supra*, 14 Cal.4th 605, 620; *People v. Ochoa* (2009) 179 Cal.App.4th 650, 657 ["A gang expert's testimony alone is sufficient to find an offense gang related"].)

**Justin Glaze's Misdemeanor Assault Conviction Is Supported by Substantial Evidence**

Justin does not challenge his conviction for the felony assault on James Sr. However, he argues in his brief: "There is simply no evidentiary basis for the jury's verdict that Justin was guilty of the lesser included crime of simple assault on David Reid on July 30, 2012. [¶] The only evidence of Justin's involvement on that day was this: Justin was seen standing with the group of kids outside Shane Alexander's house before James Sr. and David sped up to Bay Drive, jumped from their car with weapons in hand and ran into the group of kids with weapons raised. James Sr. saw Justin hit him in the area of his left hip after he hit Richard Miller, Justin's stepfather, with a golf club. James

Jr. testified at trial that he witnessed that, although he failed to tell Deputy Rossi that James Sr. first struck a blow to Justin's stepfather. [¶] However, not a single witness testified that they saw Justin anywhere near David. Indeed, David himself testified at trial that he never even saw Justin during this incident."

Insofar as Justin may be intimating that his assault conviction is vulnerable because there was no direct evidence of him actually striking David, the innuendo is misplaced. Contact is not required. (See *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028; CALCRIM No. 915 ["The People are not required to prove that the defendant actually touched someone. . . . No one needs to have been injured by the defendant's act"].) So much is apparent from the statutory definition of assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) Our Supreme Court has characterized the offense as " 'unlawful conduct immediately antecedent to battery.' " (*People v. Chance* (2008) 44 Cal.4th 1164, 1167.)

The same is true of the contention's innuendo that Justin's physical proximity to the victim is a prerequisite for conviction. "Numerous California cases establish that an assault may be committed even if the defendant is several steps away from actually inflicting injury . . . ." (*People v. Chance*, *supra*, 44 Cal.4th 1164, 1168.) Moreover, because "assault criminalizes conduct based on what *might* have happened—and not what *actually* happened," "assault does not require a specific intent to injure the victim." (*People v. Williams* (2001) 26 Cal.4th 779, 787, 788.)

The Attorney General notes that the prosecution sought to attach liability on the basis that Justin was an aider and abettor.[7] Under that principle, " 'A person aids and

[7] The Attorney General also relies on principles of conspiracy, but we do not. Our Supreme Court has long held that while not all aiders and abettors are necessarily conspirators (*People v. Durham* (1969) 70 Cal.2d 171, 181 [" '[o]ne may aid or abet in the commission of a crime without having previously entered into a conspiracy to commit it' "] (italics omitted)), all conspirators in a crime *do qualify as aiders and abettors.* (*Id.* at p. 180, fn. 7 ["the prosecution properly seeks to show through the existence of conspiracy that a defendant who was not the direct perpetrator of the criminal offense

abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime.' " (*People v. Delgado* (2013) 56 Cal.4th 480, 486.) " 'The aiders and abettor doctrine merely makes aider and abettors liable for their accomplices' actions as well as their own. It obviates the necessity to decide who was the aider and abettor and who the direct perpetrator or to what extent each played which role.' " (*Id*. at p. 487.) As we have recognized, " 'according to our Supreme Court, " '[t]o be an abettor the accused must have instigated or advised the commission of the crime *or been present for the purpose of assisting in its commission*.' " [Citations.]' " (*People v. Booth* (1996) 48 Cal.App.4th 1247, 1255, some italics omitted.) "[O]ne can be guilty as an accomplice . . . without having actually assisted the commission of the offense, . . . by having been 'present for the purpose of its commission.' " (*Id*. at p. 1256, italics omitted.)

Although it is true that David never identified Justin as being present, others, most notably James Sr., did. In the narrative quoted above, Justin concedes the testimony of James Sr., that Justin was not only present, he got hold of James Sr.'s golf club and hit him with it. The jury's verdict convicting Justin of violating section 186.22 is proof that that he was already found to have been acting in concert with other members of the Bay Boys on July 30. (See *People v. Rodriguez, supra*, 55 Cal.4th 1125, 1138 ["with section 186.22(a), the Legislature sought to punish gang members who acted *in concert* with other gang members in committing a felony"].) Because, as already established, there was substantial evidence to support that finding, "[i]t was fairly inferable that he intended to assist criminal conduct by his fellow gang members" (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198), specifically, the felony assault by Anaya. (See *People v.*

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charged aided and abetted in its commission"]; *People v. Lapierre* (1928) 205 Cal. 462, 471 ["this is not a prosecution for conspiracy, *the existence of the conspiracy showing only that appellant aided and abetted the commission of the crime*"] (italics added).) Our refusal stems from the fact that all defendants were charged with conspiracy, but the jury was unable to reach a decision on that charge, which was eventually dismissed.

*Castenada* (2000) 23 Cal.4th 743, 750 ["a person liable under section 186.22(a) must aid and abet a separate felony offense committed by [other] gang members."].)

Our Supreme Court has recently stated: " 'When two or more persons commit a crime together, both may act in part as the actual perpetrator *and* in part as the aider and abettor of the other, who also acts in part as an actual perpetrator. . . . " . . . When a person 'chooses to become a part of the criminal activity of another, she says in essence, 'your acts are my acts . . . .' " [Citation.] But that person's *own* acts are also her acts for which she is also liable.' " (*People v. Delgado, supra,* 56 Cal.4th 480, 489.) This observation seems particularly descriptive of the consequences of the Bay Boys' actions on July 30.

**Jason's Felony Assault Conviction Is Supported by Substantial Evidence**

As noted, assault requires "a present ability" to commit injury. If a firearm is involved, "assault cannot be committed with an unloaded gun, unless the weapon is used as a bludgeon." (*People v. Chance, supra,* 44 Cal.4th 1164, 1172, fn. 7.) Citing this principle, and the absence of any direct evidence, Jason contends that his felony assault conviction must be overturned because there is no substantial evidence that the firearm he supposedly used in assaulting James Jr. was loaded.

While the record does contain direct evidence that Jason had a pistol and pointed it at James Jr., it is true that the pistol was not fired, and there is no direct evidence that it was in fact loaded. Thus, the conviction stands on circumstantial evidence. But " ' "[c]ircumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt" ' " (*People v. Stanley* (1995) 10 Cal.4th 764, 793), the substantiality of which is determined by the same standards as direct evidence. (*Id*. at pp. 792–793.) If the evidence, plus all the logical inferences the jury might have drawn from that evidence, reasonably justify the jury's verdict, " ' " 'the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. ' " ' " (*Id*. at p. 793.)

Here, the circumstances which the jury could reasonably find are: Jason was a member of a criminal street gang that esteemed firearm-generated respect. Jason was in

possession of a firearm on July 30, which was a gang-sponsored event. Jason was seen pointing that weapon at one of the intended targets of the gang. Upon that weapon being seen, some non-gang member yelled the alert "Gun!," causing an exodus. From these circumstances the jury could reasonably infer that it was not likely that a member of the Bay Boys would bring an unloaded firearm to a confrontation. The cry made by a participant/observer will support the reasonable inference that it was expected that a gun produced and aimed at an intended would be loaded. In other words, the Bay Boys were not known for bringing an unloaded gun to a gang fight, so if they did bring one, it would be loaded and would fire. This circumstantial evidence is also substantial evidence. (*People v. Stanley*, *supra*, 10 Cal.4th 764, 792–793.)

**Anaya's Felony Assault Conviction Is Supported By Substantial Evidence**

Anaya next contends: "Other than David's statement that he thought it might have been appellant [Anaya] who hit him with a golf club, there is no evidence in this record of appellant participating in any assault of David Reid. . . . David's testimony that he was not sure who had hit him with a golf club, but because he saw facial hair, he thought it might have been appellant, particularly in combination with his father's testimony that it was Joey [codefendant Joseph Ramos] who hit David with a golf club, and that he also saw Justin with a golf club, and the fact there is no evidence that anyone ever saw appellant with a golf club, does not even raise to the level of creating a strong suspicion of appellant's guilt." The claim fails, because it asks us to exceed our powers of review.

A jury's authority to assess evidence, and particularly testimony, is extremely broad, and does not admit of second-guessing on appeal. "Testimony may be rejected only when it is inherently improbable or incredible, i.e., ' "unbelievable *per se*," ' physically impossible or ' "wholly unacceptable to reasonable minds." ' " (*Oldham v. Kizer* (1991) 235 Cal.App.3d 1046, 1065.) "The uncorroborated testimony of a single witness is sufficient to support a conviction, unless the testimony is physically impossible or inherently improbable." (*People v. Scott* (1978) 21 Cal.3d 284, 296.)

"The jury may accept as true a portion of the testimony of a witness and disbelieve the remainder or have a reasonable doubt as to its correctness." (*People v. Crocker*

(1956) 47 Cal.2d 348, 355.) "The jurors were entitled to accept or reject all of the testimony, or a portion of the testimony, by any of the [] witnesses." (*People v. Lacefield* (2007) 157 Cal.App.4th 249, 261.) "While some of this evidence was conflicting or inconsistent, it was for the trier of fact to resolve these matters and accept such portions thereof as carried greater persuasive force while discounting the rest." (*Kalfus v. Fraze* (1955) 136 Cal.App.2d 415, 425.) "Inconsistencies in testimony and a failure to remember aspects of the subject of a testimony . . . do not disqualify a witness. [Citation.] They present questions of credibility for resolution by the trier of fact." (*People v. Mincey* (1992) 2 Cal.4th 408, 444.) "Weaknesses and inconsistencies in eyewitness testimony are matters solely for the jury to evaluate." (*People v. Allen* (1985) 165 Cal.App.3d 616, 623.) And on appeal, the reviewing court "must accept that part of the testimony which supports the judgment" (*In re Daniel G.* (2004) 120 Cal.App.4th 824, 830), "that part which supports the judgment must be accepted, not that part which would defeat or tend to defeat it." (*People v. Hrisoulas* (1967) 251 Cal.App.2d 791, 796.) In other words, "[s]ubstantial evidence may be found in 'only part of a witness's testimony.' " (*People v. Jones* (2010) 186 Cal.App.4th 216, 248, fn. 4.)

Anaya is implicitly hoping that this court will overlook these rules governing our review for substantial evidence. That hope cannot be gratified because, as already noted, it would involve this court in an improper reweighing of the jury's credibility assessment of David's testimony. (*People v. Lindberg*, *supra*, 45 Cal.4th 1, 27; see *People v. Guerra*, *supra*, 37 Cal.4th 1067, 1129.) We must presume the jury accepted David's testimony as identifying Anaya as the person who attacked him with the golf club. That testimony by itself is adequate substantial evidence. (Evid. Code, §§ 312, 411; *People v. Scott*, *supra*, 21 Cal.3d 284, 296.)

**Anaya's Misdemeanor Assault Conviction Is Supported by Substantial Evidence**

Concerning his misdemeanor conviction for assaulting James Sr., Anaya's contention is, in its entirety this: "There is even less evidence supporting the misdemeanor conviction for assault of James Reid, Sr. Reid, Sr. testified that during the fight, he was hit on the side of the head and then in his ribs by Richard Miller, Sr.,

causing him to drop to his knees. Nowhere in the record does Reid, Sr., or anyone else, identify appellant as assaulting him. This conviction also must be reversed." We disagree.

A preceding section of this opinion established that Anaya's conviction under section 186.22 for the events of July 30 established his actual presence and concerted participation as a member of a criminal street gang. The immediately preceding section of this opinion established there is substantial evidence establishing Anaya as the perpetrator of a felony assault on David, reinforcing his complicity. The section preceding that discussed the applicable principles of aiding and abetting liability. And there was copious evidence of Anaya's prominence and importance in the gang due to his drug dealing. Just as Justin was properly found guilty as a misdemeanor aider and abettor of Anaya's felony assault on David, so too could Anaya be found a misdemeanor aider and abettor of Justin's felony assault on James Sr. In other words, by assisting in the attack on one of the three victims, Anaya was assisting other gang members to attack the other victims. It would not be unreasonable for the jury to conclude that Anaya "intended to assist criminal conduct by his fellow gang members." (*People v. Morales*, *supra*, 112 Cal.App.4th 1176, 1198) Thus, we conclude that there is substantial circumstantial evidence to uphold Anaya's misdemeanor conviction.

**There Was No Error in the Self-Defense Instructions**

The jury was instructed on self-defense as follows:

"Self-defense is a defense to the crimes charged . . . and the lesser-included crime of simple assault . . . . A defendant is not guilty of these specific offenses if he used force against the other person in lawful self-defense of himself or defense of another. A defendant acted in lawful self-defense or defense of another if:

"1. The defendant reasonably believed that he or someone else was in imminent danger of suffering bodily injury;

"2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger; and

"3. The defendant used no more force than was reasonably necessary to defend against that danger.

"Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. A defendant must have believed there was imminent danger of violence to himself or someone else. The Defendant's belief must have been reasonable and he must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the defendant did not act in lawful self-defense or defense of another.

"When deciding whether a defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

"A defendant is not required to retreat. He is entitled to stand his or her own ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of bodily injury has passed. This is so even if safety could have been achieved by retreating.

"The People have the burden of proving beyond a reasonable doubt that a defendant did not act in lawful self-defense or defense of another. If the People have not met this burden as to a particular charged crime or lesser-included crime, you must find the defendant not guilty of the crime." (CALCRIM No. 3470.)

"A fight is mutual combat when, outside the rules of sport—we're excluding hockey games, boxing matches. A fight is mutual combat when, outside the rules of sport, a fight begins or is continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self-defense arose.

"In such a situation all parties to the combat are guilty of criminal assault and no participant in mutual combat has a valid claim of self-defense. There is an exception to

this general rule. A person who engages in mutual combat or who is the initial aggressor has a right to self-defense only if:

"1. He actually and in good faith tries to stop fighting;

"2. He indicates, by word or by conduct, to his opponent, in a way that a reasonable person would understand, that he wants to stop fighting and that he has stopped fighting; and

"3. He gives the opponent a chance to stop fighting.

"If a person meets these requirements, then he has a right to self-defense if the opponent continues to fight.

"If you decide that the defendant, or I should say a defendant, was the initial aggressor who started the fight using non-deadly force and the opponent responded with such sudden and deadly force that a defendant could not withdraw from the fight, then the defendant had the right to defend himself with deadly force and was not required to try to stop fighting." (CALCRIM No. 3471.)

"A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force." (CALCRIM No. 3472.) The jury was also instructed that a defendant should not be found guilty of assault if "the defendant . . . act[ed] in self-defense or in defense of someone else."

Jason carries the laboring oar in attacking CALCRIM No. 3471 on mutual combat. As framed in his opening brief, he "contends that the delivery of the mutual combat instruction was error in the following ways:

"1. There was insufficient evidence of 'mutual combat.'

"2. There was insufficient evidence of the necessary element of mutual combat that Appellant Jason agreed with the Reids to fight before the fight began.

"3. There was insufficient evidence of the necessary element of mutual combat that Appellant Jason Glaze started the fight.

"4. In addition, the wording of the mutual combat instruction was defective because it failed to tell the jury that, before it could apply the mutual combat exception to self-defense, it needed to find:

"(a) that the defendants started the fight;

"(b) that the defendants and the Reids agreed to fight before the fight started; and

"(c) that Appellant Jason Glaze individually agreed to fight the Reids, before the fight started."

Jason further argues that CALCRIM No. 3472 should not have been given "because there was insufficient evidence to support it . . . . There was no evidence that Jason participated in any aspect of this melee until after James Sr. and David Reid arrived with their weapons and started attacking Jason's friends and relatives."

Anaya joins these arguments. Justin also argues that CALCRIM 3471 was erroneously given because the predicate of mutual combat was not supported by the evidence.

The Attorney General responds that the merits of these arguments need not be addressed because Jason requested the court instruct with CALCRIM No. 3471, thus forfeiting the claim. "Likewise" for Justin and Anaya "by failing to object to the requested instruction." The Attorney General relies on the principle of appellate procedure that "A trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel [citations], and failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal [citations]." (*People v. Lee* (2011) 51 Cal.4th 620, 638; accord, *People v. Whalen* (2013) 56 Cal.4th 1, 81–82.) Jason replies with (1) the instruction is not "an accurate statement" of the law of self-defense, (2) "the trial court did not deliver the instruction which trial counsel requested," so there is no invited error, and, if these fail, (3) trial counsel was constitutionally incompetent for failing to request the modifications appellate counsel now identifies. We first consider the second of these points.

When the Attorney General argues that trial counsel asked for CALCRIM No. 3471, she cited to page 741 of the clerk's transcript. That page, part of "Defendant Jason Glaze's Requested Jury Instructions," simply lists CALCRIM instructions by number and title (i.e., "3471—Right to Self-Defense: Mutual Combat or Initial Aggressor"). No further details are provided. There are no clarifying details in the discussions in

chambers about instructions, nor was there protest from trial counsel when CALCRIM No. 3471 was given as quoted above.[8] The only other defense input about instructions was "Defendants' Jointly Requested Pinpoint Jury Instructions," prepared by Jason's counsel on behalf of Justin and Anaya, which requested the court to "add the following language" to a number of instructions, but did not mention CALCRIM No. 3471. Thus, on the face of this record, there is nothing to indicate that Jason's trial counsel did not get exactly what he requested.

"When defense counsel makes a ' "conscious deliberate tactical choice" ' to request an instruction, any error in the giving of the instruction is invited and cannot be raised on appeal." (*People v. Catlin* (2001) 26 Cal.4th 81, 150; see *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 49 ["In cases involving an action affirmatively taken by defense counsel, we have found a clearly implied tactical purpose to be sufficient to invoke the invited error rule."]; *People v. Hernandez* (2003) 111 Cal.App.4th 582, 590 [by requesting CALJIC predecessor of CALCRIM No. 3471, "defense counsel invited the claimed error"].) The record shows what clearly appears a deliberate and affirmative tactical decision to have the jury decide the self-defense theory with the guidance of CALCRIM No. 3471, thus offering the jury a basis for acquittal. And the collective silence by defense counsel when the instruction was given eloquently refutes Jason's unsubstantiated claim that "the trial court did not deliver the instruction which trial counsel requested."

Even if the merits of the contention had been preserved for review, they would not demonstrate error. Virtually the only authority cited in Jason's brief (and Justin's) is *People v. Ross* (2007) 155 Cal.App.4th 1033 (*Ross*). But *Ross* is immediately distinguishable because it considered the CALJIC predecessor of CALCRIM No. 3471. (See *id*., at p. 1042, fn. 9 [setting out delivered text of CALJIC No. 5.56].) Moreover, *Ross* involved a single defendant and a single victim, and the Court of Appeal acknowledged that it did not consider the situation closer to the setting presented here:

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[8] Although during closing argument, Jason's counsel told the jury that "3471 . . . This mutual combat instruction [¶] . . . [¶] is a red herring. It doesn't apply."

"Determining what constitutes mutual combat in the setting of a gang battle or war may present unique difficulties. (Cf. *People v. Sanchez* (2001) 26 Cal.4th 834, . . . 848 . . . [' "there was sufficient evidence to support a jury finding that rival groups tacitly agreed, pursuant to an 'unwritten code of macho honor,' that there would be mutual combat and that each group aided, abetted and encouraged its adversary to engage in urban warfare" '].) These difficulties are not present here, where the paradigm is MacBeth versus MacDuff, not the Capulets versus the Montagues." (*Ross*, at p. 1046, fn. 16.) True, we do not have "a gang battle or war" in that there is, at most, only one gang involved. But that gang was not squaring off against an individual, but confronting another group, i.e., the three Reids.

*Ross* is further distinguishable because it addressed the failure of the CALJIC instruction to define "mutual combat," a concept which the jury in *Ross* asked the trial court to explain, a request the trial court refused. (*Ross*, at pp. 1042–1043, 1047–1049.) That left the *Ross* jury free to believe that "any combat may be . . . 'mutual' so long as it is seen to possess a quality of reciprocity or exchange . . . 'mutual combat' might properly describe any violent struggle between two or more people, however it came into being." (*Id*. at p. 1044.) Here, the jury was provided a modified version of CALCRIM No. 3471 defining mutual combat ("A fight is mutual combat when . . . "), a definition derived from *Ross*[9], and a definition which the jury expressed no difficulty in comprehending.[10]

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[9] "We are satisfied that 'mutual combat' consists of fighting by mutual intention or consent, as most clearly reflected in an express or implied *agreement* to fight. The agreement need not have all the characteristics of a legally binding contract; indeed, it necessarily lacks at least one such characteristic: a lawful object. But there must be evidence from which the jury could reasonably find that *both combatants actually consented or intended to fight before the claimed occasion for self-defense arose*." (*Ross*, at pp. 1046–1047.) The bench notes to CALCRIM No. 3471 cites *Ross* as "authority" for the "definition of mutual combat." (2 Judicial Council of Cal. Crim. Jury Instns. (2015) CALCRIM No. 3471, p. 986.)

[10] Nor was that difficulty encountered by others. Defendants' own gang expert Harrison treated what happened after James Sr. and David drove up as mutual combat, terming it

Jason faults CALCRIM No. 3471 as given because it "failed to instruct that each individual defendant, especially appellant Justin Glaze, must personally agree to fight, before the mutual combat exception applies." Justin may go even further, to the extent of requiring the agreement to be between each particular attacker and victim. We cannot conceive that the *Ross* court intended such an interpretation, one so at odds with common sense. The notion of "personal agreement" between individual combatants in a gang fight is contrary to the *Ross* court's definition of mutual combat as encompassing "an . . . implied agreement to fight" based on "evidence from which the jury could reasonably find that [the] combatants . . . intended to fight" (italics omitted). The whole point of gangs is the facilitation of acting in concert (*People v. Rodriguez*, *supra*, 55 Cal.4th 1125, 1138), to de-emphasize the individual in favor of the group.

The same is true with respect to Jason's desired modification that CALCRIM No. 3471 should advise the jury "that the mutual combat exception only applies if the defendant starts, rather than just continues, the fight." If both fighters agree to mutual combat, what sense is there to giving the defendant the protection of the exception only if he throws the first punch or fires the first shot?

Because Jason's legal approaches are misplaced, it follows that his correlated arguments concerning the lack of evidence for those erroneous propositions also fail.

We also note that CALCRIM No. 3471 is written in the disjunctive, applying when a person is engaged in mutual combat *or* is the initial aggressor. Thus it would cover the "thumping" given to James Jr., which was the trigger for the larger fracas that ensued, for which there was substantial evidence that it was initiated by the Bay Boys.

In sum, there was no sua sponte duty to modify CALCRIM No. 3471 in the ways identified in this appeal. Even if such modifications had been requested, they would have been properly refused. It follows that trial counsel was not ineffective for not making

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"a Donnybrook." Justin now attempts to distance himself from this testimony, stating in his brief that Harrison's opinion "has no bearing on the legal question of whether the jury was properly instructed" because "Harrison was not a lawyer, judge or legal scholar." But at the time of sentencing the trial court also characterized the events of July 30 as "a mutual combat."

such a futile request. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1222; *People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 836.)

There remains Jason's argument that CALCRIM No. 3472 should not have been given "because there was insufficient evidence to support it," together with Justin's argument that "the jury was improperly instructed on mutual combat because the evidence was insufficient to support a finding that any of the defendants engaged in mutual combat." Justin reasons that "the only 'fight' relative to this inquiry concerns the brawl that ensued when the Reids sped up Bay Drive . . . , lept out of their vehicle with weapons at the ready, and attacked." Not true. Given the close proximity in time and location, the Bay Boys' "thumping" of James Jr. must also be considered. It is a reasonable inference from Deputy Marchese's testimony that the gang anticipated that beating the one son would bring the father and the other son to the scene, at which point the gang would satisfy its desires to punish the Reids and drive them from the neighborhood.

Finally, after briefing had been completed, Division Three of the Fourth Appellate District issued *People v. Ramirez* (2015) 233 Cal.App.4th 940 (*Ramirez*). We granted a request for supplemental briefing on the application and impact of *Ramirez*. Again, it is Jason who presents arguments that are joined by Justin and Anaya.

Defendants Victor and Armando Ramirez were brothers and members of a gang. The house in which they lived was subjected to a campaign of harassment by another gang. The brothers decided to halt the harassment by confronting the other gang. Armando took a gun. Together with another member of their gang, the brothers confronted a group from the other gang, one of whom "may have thrown the first punch." In the ensuing melee, Armando believed brother Victor was about to be shot by one Rivera, and "Armando pulled his gun from his sweatshirt pocket and fatally shot Rivera. . . . Armando claimed he acted in self-defense and to defend his companions." (*Ramirez*, at pp. 944–945.) Both Armando and Victor were convicted of first degree murder.

A divided Court of Appeal reversed, stating at the start of the opinion that CALCRIM No. 3472 "misstated the law. A person who contrives to start a fistfight or

provoke a non-deadly quarrel does not thereby '[f]orfeit his right to live.' (*People v. Conkling* (1896) 111 Cal. 616, 626 . . . .) Instead, he may defend himself 'even when the defendant set in motion the chain of events that led the victim to attack the defendant.' (*People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1179–1180 . . . .)" (*Ramirez*, at p. 943.)

However, later in their opinion, the majority backed away from this absolute statement: "CALCRIM No. 3472 states a correct rule of law *in appropriate circumstances*. Thus, a victim may respond to an attacker's initial physical assault with a physical counterassault, and an attacker who provoked the fight may not in asserting he was injured in the fray claim self-defense against the victim's lawful resistance." (*Ramirez*, at p. 947, italics added.) More particularly, "CALCRIM No. 3472 *under the facts before the jury* did not accurately state governing law. The blanket rule articulated in CALCRIM No. 3472 and reiterated by the prosecutor effectively told the jury, 'A person does not have [*any*] right to self-defense if he provokes a fight or quarrel with the intent to create an excuse to use [*any*] force.' In effect, the prosecutor and the trial court advised the jury that one who provokes a fistfight forfeits the right of self-defense if the adversary resorts to deadly force. The adversary simply may stab or shoot a person who contrives what he thought would be a shoving match or fisticuffs. According to the prosecutor and the trial court's instruction: 'A person does not have the right of self-defense' in those circumstances." (*Id.*, initial italics added.)

We do acknowledge that the old, and rarely-cited, *People v. Conkling*, *supra*, 111 Cal. 616, does lend support to *Ramirez*. In *Conkling*, a man erected a fence to block access to a road he controlled across land that had been used by defendant and others. (*Id.* at pp. 619–620.) Defendant later tore down the fence, used the road, then shot and killed the man when defendant encountered him on a return trip across the road. (*Id.* at p. 620.) The jury was instructed on self-defense principles, including that " 'while it is true that an honest apprehension of danger to life or limb may justify a man for taking the life of another, yet that apprehension must arise out of a reasonable cause; but a cause which originates in the fault of the person himself, in a quarrel which he has provoked, or in a

danger which he has voluntarily brought upon himself by his own misconduct, cannot be considered reasonable or sufficient in law to support a well-grounded apprehension of imminent danger to his person.' " (*Id.* at pp. 624–625.) Our Supreme Court reversed defendant's conviction for first degree murder, concluding that the broadly worded instruction could have misled the jury into believing that defendant lacked a right to self-defense because he had removed the obstruction on the victim's road, even if the victim attacked him while he later traveled the road. (*Id.* at pp. 619, 625.)

But *Conkling* stands in contrast to more numerous and recent precedent from the Supreme Court and the Courts of Appeal. The most prominent is *People v. Hinshaw* (1924) 194 Cal. 1, 26, where our Supreme Court approved an instruction "that correctly state[d] the recognized principle of law 'that self-defense is not available as a plea to a defendant who has sought a quarrel with the design to force a deadly issue and thus, through his fraud, contrivance or fault, to create a real or apparent necessity for making a felonious assault.' " (Accord, e.g., *People v. Enraca* (2012) 53 Cal.4th 735, 761–762; *People v. Valencia* (2008) 43 Cal.4th 268, 288; *People v. Hecker* (1895) 109 Cal.451, 462–463; *People v. Hardin* (2000) 85 Cal.App.4th 625, 633–634 [defendant cannot claim self-defense when "[t]he entire situation was created" by him].) *People v. Vasquez*, *supra*, 136 Cal.App.4th 1176, another murder conviction, involved a complete refusal to instruct on self-defense. Thus, we do not necessarily accept the *Ramirez* court's conclusion that *Conkling* and *Vasquez* compel the conclusion CALCRIM No. 3472 "misstate[s] the law."

Additionally, we question whether the *Ramirez* court was correct in treating the impact of CALCRIM No. 3472 as having "erroneously prevented the jury from considering [the defendants'] self-defense claim." (*Ramirez*, at p. 943.) There is no indication that the trial court in *Ramirez* was deciding the issue as a matter of law; it was in plain effect leaving the issue to the jury, which could decide whether the fight was provoked or contrived. The trial court in *Ramirez*, like here, instructed the jury with the full panoply of CALCRIM self-defense instructions, and allowed unfettered argument on

the issue of whether defendants acted in self-defense, actions that hardly seem likely to have "prevented the jury from considering [the] self-defense claim."

The point of argument by counsel is significant because it appears to be the reason for some of the qualifying language in *Ramirez*. The *Ramirez* court repeatedly emphasized the prosecutor's use of CALCRIM No. 3472 to tell the jury that self-defense was not available to the defendants. (*Ramirez*, at pp. 943 ["The prosecutor argued repeatedly based on the plain terms of this instruction that . . . defendants . . . forfeited a claim of . . . self-defense"], 946 ["The prosecutor argued it precluded any claim of self-defense" "The prosecutor argued the instruction precluded a claim of self-defense in all possible circumstances under the evidence"], 950 ["the prosecutor . . . erroneously argued CALCRIM No. 3472 obliterated all forms of self-defense—both perfect and imperfect self-defense alike—if the defendant contrives to use any force"], 952 ["CALCRIM No. 3472 as . . .argued by the prosecutor erroneously foreclosed defendants' imperfect self-defense claim"].) But if that was an aggravating factor in *Ramirez*, it is absent here.

The subject of self-defense did not feature prominently in the prosecutor's closing argument. Indeed, to the extent it was addressed, the context was primarily about how James Sr. and David were entitled to invoke the defense in responding to the "thumping" of James Jr. The only clear reference to CALCRIM No. 3472 was in connection with the July 29 incident with the Bolter brothers which led to the next day's charged offenses.[11]

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[11] "And another jury instruction says that, A person does not have the right to self-defense if he provokes a fight or quarrel with an intent to create an excuse to use force. [¶] So I kind of wrote a question down here which was, Was James Jr.'s assault an act of provocation to encourage the Bolters to return? Besides I think the—seems from the evidence that all this anger was focused on Jeremy. . . . [¶] And all the evidence suggests that it was Gary and Jeremy initially and even at the end, that they were mostly angry about because of what happened to Brian Lewis. And then for whatever reason Thomas McCaslin and several others took it upon themselves to just assault James Reid, Jr. as he's trying to get his family loaded into the car. They actually chased him down. [¶] And so, you know, what's the purpose of yelling about Gary and Jeremy then assaulting James Jr. and then staying outside and continuing to yell[] about Gary and Jeremy about how they have to leave the neighborhood. [¶] I will submit to you a reasonable interpretation is they are trying to stir the pot . . . . [¶] So then having those

Beyond that, the prosecutor did not argue that the defendants were precluded from claiming self-defense, only that the jury should not interpret the evidence to justify their entitlement to assert the defense. Moreover, none of defendants' counsel was foreclosed from arguing self-defense. For example, Jason's counsel argued: "Jason's act was in lawful self-defense . . . of others. CALCRIM 470. That's the instruction about lawful defense of another. The elements are met here. Jason reasonably believed that someone else was in imminent danger of suffering bodily injury. [¶] Jason believed immediate use of force was necessary to defend against the danger." "Jason is not the initial aggressor. Jason is not engaged in mutual combat. If Thomas McCaslin was the initial aggressor ten minutes ago in a fight with James Jr. that had stopped, that had nothing to do with . . . Jason's right to defend Joey McCaslin."

Finally, the trial court instructed the jury with CALCRIM No. 200 that "Some of these instructions may not apply, depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them." Unlike the *Ramirez* court, we do not conclude that CALCRIM No. 3472 "required the jury to conclude" the issue of provocation against defendants. (*Ramirez*, at p. 953.) As will be shown in the next part of this opinion, the issue of self-defense could not be decided as a matter of law. The jury was free to decide either way. If the jury decided that defendants did not provoke the fight with James Sr. and David, they were bound by CALCRIM No. 200 to ignore CALCRIM No. 3472, in which case CALCRIM No. 3472 was harmless. (E.g., *People v. Rollo* (1977) 20 Cal.3d 109, 122–123; *People v. Frandsen* (2011) 196 Cal.App.4th 266, 278; *People v. Olguin*, *supra*, 31 Cal.App.4th 1355, 1381–1382; *People v. Lee* (1990) 210 Cal.App.3d 829, 841.) Conversely, if the jury determined that James Sr. and David were acting properly in defense of James Jr., that they were lured to the scene by the beating of James Jr., it cannot be held that submitting that issue to the jury was incorrect. As has been

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ideas of self-defense in mind, I will talk about James Sr. and [the section] 245 . . . assault with a deadly weapon . . . ."

repeatedly noted in the context of self-defense instructions: " 'A trial judge's superior ability to evaluate the evidence renders it highly inappropriate for an appellate court to lightly question his determination to submit an issue to the jury. A reviewing court certainly cannot do so where, as here, the trial court's determination was agreeable to both the defense and the prosecution.' " (*People v. Olguin*, *supra*, at p. 1381.)

**Justin Was Not Acting in Lawful Self-Defense as a Matter Of Law**

Justin contends his assault convictions must be reversed "for the additional reason that the prosecution failed to prove beyond a reasonable doubt that Justin did not act in lawful self-defense or defense of others." For present purposes, Justin accepts "the jury was properly instructed on self-defense or defense of others in accordance with CALCRIM 3470." But he argues his belief of imminent danger was legitimate, and that he "used an amount of force necessary to legally defend himself and his stepfather [codefendant and Bay Boy Richard Miller]." Justin is in effect arguing that he was acting in self-defense as a matter of law. While this claim is permitted, it has never been sustained in a reported decision we have found.

"Issues arising out of self-defense, including whether the circumstances would cause a reasonable person to perceive the necessity of defense, whether the defendant actually acted out of defense of himself, and whether the force used was excessive, are normally questions of fact for the trier of fact to resolve." (*People v. Clark* (1982) 130 Cal.App.3d 371, 378, disapproved on another ground in *People v. Blakeley* (2000) 23 Cal.4th 82, 92.) "[W]here the evidence is uncontroverted and establishes all of the elements for a finding of self-defense it may be held as a matter of law that the [battery] was justified; however, where some of the evidence tends to show a situation in which [the use of force] may not be justified then the issue is a question of fact for the jury to determine. [Citation.] Where the evidence is uncontroverted, but reasonable persons could differ on whether the resort to force was justified or whether the force resorted to was excessive, then the issue is a question of fact for the trier of fact." (*People v. Clark, supra,* at p. 379.)

As may be seen from these excerpts, the issue is dependent upon the state of the record. If there was evidence which, if accepted as credible by the trier of fact, opposes or disproves the claim of self-defense, the claim is to be treated as simply one of substantial evidence.

This is how Justin views the record: "There is no dispute that James Sr. and David sped up Bay Drive, jumped out of their vehicle armed with a golf club and bat, and attacked an unarmed group, including Justin, his family and friends. Almost immediately, Richard Miller, Justin's stepfather, was struck as many as three times by James Sr., with the golf club. Under these circumstances, Justin was reasonable in believing that James Sr. might continue to inflict additional injuries to either Miller or Justin himself. [¶] . . . In defending himself and his stepfather, Justin struck James Sr. in the area of [his] left hip. He struck him only once. James Sr. did not sustain serious injury from that strike. The force used was not disproportionate to Justin's reasonable perception of imminent threat of bodily injury. [¶] The evidence amply demonstrates that Justin acted in lawful self-defense . . . The prosecution did not meet its burden of proving otherwise. The only possible theory upon which the jury could have rejected this defense lies in the court's erroneous instruction on mutual combat." The jury could indeed have agreed with this version of what happened. But it did not.

Our Supreme Court has held " 'the ordinary self-defense doctrine—applicable when a defendant *reasonably* believes that his safety is endangered—may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of physical assault or the commission of a felony) has created circumstances under which the adversary's attack or pursuit is legally justified.' " (*People v. Valencia*, *supra*, 43 Cal.4th 268, 288.) The discussion in the immediately preceding section of this opinion showed that there was evidence from which the jury could conclude that the gang intentionally created a situation to lure the Reids to a collective beating. That is the point of CALCRIM No. 3472, that "it was for the jury to decide whether defendant's participation in the melee was legally justified or whether violent criminal activity had been proven."

(*People v. Jackson* (2014) 58 Cal.4th 724, 760–761.) Because not all other possibilities were excluded, self-defense was not established as a matter of law.

**The Trial Court Did Not Commit Misconduct**

"A trial judge may examine witnesses to elicit or clarify testimony . . . [but] must not become an advocate for either party or under the guise of examining witnesses, comment on the evidence or cast aspersions or ridicule on a witness." (*People v. Rigney* (1961) 55 Cal.2d 236, 241.) Justin, joined by Anaya, contends the trial court compromised its impartiality "when it interfered in the questioning of a defense expert and erroneously excluded critical evidence to support Justin's claim of self-defense." This contention has two parts. Neither has merit.

Jason's first contention asserts judicial interference. Justin quotes only a portion of the record to substantiate his argument. However, greater quotation is required to establish the true context and tenor of the court's remarks and the claimed "interference."

Mark Harrison was testifying on direct examination by Justin's counsel, concerning why he disagreed with Deputy Marchese's conclusion that the Bay Boys constituted a criminal street gang when the following occurred:

"Q. How do you react to Deputy Marchese's opinion that sales of narcotics is their primary activity?

"A. Well, I mean, I know Deputy Marchese very well. I have a lot of respect for him. He is a hardworking guy. Jumping from the investigative and doing the analysis or the synthesis of this information, I think he does not understand there is a critical—

"MR. BELL [the prosecutor]: Objection. To just his criticism of Marchese.

"THE COURT: Overruled. By the way, are you saying that under your view, a gang has to have a single primary activity?

"THE WITNESS: No.

"THE COURT: The statute allows one or more primary activities, right?

"THE WITNESS: Correct.

"THE COURT: So your opinion is that this group, if it is a group at all, and I'm noting you said it is a group, has no primary activity. That would be the only way you

would not qualify, right? The group would have to be a group that had no primary activity, because as long as it had a primary activity that was one the list of 33 offenses, it would have a primary activity. Or if it had multiple primary activities on that list of 33, it would have one or more primary activities.

"THE WITNESS: Well, the problem is, it becomes a number game. What crime is committed more frequently becomes, by default, the primary activity.

"THE COURT: But you can have several primary activities. There is no requirement in the law that one primary activity being a numerical equal of another primary activity.

"THE WITNESS: No, but it's very clear that if someone is doing murders and they do one murder, it's not the primary activity. It could be collateral to the underlying primary activity.

"THE COURT: So long as it has at least one primary activity, that one primary activity doesn't have to be the only criminal conduct that the group engages in, right?

"THE WITNESS: Right. But the focus is on the individuals involved are collectively engaged in that primary activity. So in other words, if you have a group that the primary activity is distribution in the sales of narcotics—

"THE COURT: Right, but as long as that group has one primary activity, it's allowable that they have other activities, whether or not those others are primary or not.

"THE WITNESS: Are you referring to the barbecue side of it?

"THE COURT: No, I'm referring to the 33 enumerated criminal activities in the statute.

"THE WITNESS: Right.

"THE COURT: The group has to have at least one as, a quote, primary activity.

"THE WITNESS: Correct.

"THE COURT: That's all that's required, correct?

"THE WITNESS: Yes.

"THE COURT: All right. Next question.

"BY MR. KULUK [Jason's counsel]:

"Q. Given all of that, does this group have a primary activity that is a commission of any one of those 33 enumerated crimes?

"A. Well, certainly they commit a crime that is one of the enumerated 33, but in my opinion it is not the primary activity, because I don't agree that they are a gang.

"Q. Does the involvement of who has committed different past crimes go into your analysis?

"A. Yes.

"Q. Okay So let's talk about—

"THE COURT: But, excuse me, again. You have an opinion that they are not a gang for reasons other than whether or not they are engaged in the crimes that consist of a primary activity. There are other reasons why you don't think they are a gang?

"THE WITNESS: Right.

"THE COURT: Having to deal with these other factors that Mr. Kuluk is talking about.

THE WITNESS: Yes.

"THE COURT: But would you agree, for example, that an organized group of people who are not a gang could have a primary activity that they are involved in?

"THE WITNESS: Yes.

"THE COURT: Such as drug dealing?

"THE WITNESS: Yes.

"THE COURT: All right. That would necessarily make the organized group, um, they could just be a conspiracy, a group of persons who are working with each other to commit a criminal offense—

"THE WITNESS: And I testified to that.

"THE COURT: —who aren't necessarily a gang, right?

"THE WITNESS: Right.

"THE COURT: That group's primary activity would be involvement in drug activity.

THE WITNESS: Right.

"THE COURT: All right. So what we are looking at here is a set of requirements any one of which if it's lacking means that there's no gang activity because there's no gang.

"THE WITNESS: Well —

"THE COURT: But that doesn't mean the primary activity isn't taking place.

"THE WITNESS: Well, they can conspire to distribute drugs, but the whole idea of the gang as the conduit or the vehicle in which they commit the drugs, also may be a conspiracy within the conspiracy.

"THE COURT: Okay.

"MR. WILLIAMS [Justin's counsel]: Judge, please.

"MR. KULUK: I would like to object for the record and ask the court to stop cross-examining the witness."

At this point there is a "brief pause in the proceedings."[12] The reporter's transcript resumes with Mr. Kuluk continuing his direct examination of Harrison. Eventually, Mr. Kuluk was allowed "to make a record on the prior objection" out of the jury's presence:

"MR. KULUK: Your Honor, with all due respect, I do believe it was inappropriate for the court to cross-examine Mr. Harrison, as was being done. Mr. Harrison was not misstating the law in any way. I think the discussions in chambers, the court may have been conflating the pattern of criminal activity which merely requires the predicate offense with the primary activity.

"Mr. Harrison was not saying that there isn't a pattern of activity, however the —

"THE COURT: No, his last answer to the question was exactly the problem that I have and still have a problem with his answer, but I'm confident that it will be cleared up with legal instructions. He said that because there is no gang, there can't be a primary activity. And I looked at the statute as having components. And the fact that the primary

[12] It may or may not be relevant or coincidental that the defense objected after the court raised the subject of conspiracy, which was one of the charged offenses against all of the defendants. (See fn. 7, *ante*.)

activity component is satisfied, doesn't mean that all the requirements of the statute have been satisfied.

"I think the witness is conflating satisfying the primary activity component with whether or not he thinks there is a gang in the first place. I think an organized group that was not a gang could have as its primary activity drug dealing. And so the witness is saying, you don't have a primary activity here, because you don't have a gang. I suppose you don't have a primary activity, but only for purposes of the application of this specific statute. But the fact of the matter is a drug conspiracy can have a primary activity, so I don't know if the witness is meaning you don't have a primary activity, but only in the technical sense that I don't think there is a gang there in the first place, is how I understand the answer—even the very last answer, the very last question before we broke.

"There wasn't a pattern of activity that he was addressing, nor was it the pattern of activity that I was addressing. I was addressing his contention that a group can't have a primary activity, because it doesn't otherwise meet the qualities of a gang. I agree with that, only in a sense that there is not going to be a primary activity if you don't have these other statutory elements that have been met in terms of the unique sign, symbol, name, whatever the categories are, et cetera.

"But when you have a witness that starts to define the statute in that way, I feel it's appropriate for the court to try to ask questions that might make it clear to the jury what the law actually requires. And I do agree with that. I probably ask more questions than most judges do. Usually I try to avoid questions where I'm cross-examining somebody on an important point specifically. Usually I'll just try to ask questions that clarify time of day, day of week, that sort of thing, July 29th, July 30th being Monday or Tuesday, that sort of thing. So that the jury has a framework of facts that it can then decide the tougher more subjective issues.

"Here, if you have a witness in effect testifying about what the law means, I think I have more of an obligation to make sure that the jury has appropriate guidance on what the law requires in any given case and it's not necessarily just left up to the written legal

instruction that they get at the end of the case when you have somebody testifying as to what the law is.

"MR. KULUK: Judge, my position here is that Mr. Harrison was testifying to his opinion of the law to the facts of this case, not misstating the law, and that the court's number, manner and tone of questioning prejudiced the jury against this witness.

"THE COURT: Well, I did not ask any questions in the court's view that had any sort of tone that I had when asking any other questions.

"On the other hand, I think it's appropriate to ask a question that where the witness' testimony impinges on a legal interpretation that might be incorrect.

"Now, I suppose there is a fine distinction between a primary activity of a gang and primary activity of a group that is not otherwise a gang, and I suppose that, at least I hope that that's what the jurors are interpreting in terms of even the very last answer that the witness gave.

"In other words, the use of primary activity, but only in a technical legal sense as that term is met in the statute 186.22 itself, but . . . I hope at the end of the case when I give them sufficient legal instructions, that they will make that distinction. The jury will make a distinction between what the witness said and what the statute requires."

Justin's trial counsel also objected: "What happened was he was opining on whether methamphetamine sales, whether there was evidence that methamphetamine sales constitute primary activity in this group, at which point the court intervened and said, 'Well, you could have many primary activities,' which I think is true, but it wasn't, um, at that point, particularly relevant to what the expert was testifying about. I think it had—it strongly implied that the court disagreed with what the expert was saying and it had. . . a strong effect on the jury . . . [¶] . . . because it really appeared that the court was at odds with what the expert was saying even though the expert hadn't misstated the law at all."

"THE COURT: The thing that he said that got me involved was that, at my recollection, is they could not have a primary activity because they were not a gang.

"MR. WILLIAMS: I think that is what he said later.

"THE COURT: No, that's what he said to start off with and that's what got me to ask questions. Because in the court's view, any organized group can have a primary activity whether they are a gang or not. That was the only, um, the only observation that I was making was that you can't say because they don't have red bandanas and this, that, and the other thing, in terms of having all of those other statutorily mandated circumstances that have to be met as well. . . .

"Primary activities are a separate and distinct category or issue that has to be satisfied independently of those other requirements."

". . . I was disagreeing with the interpretation of the testimony that a particular group has to have one and only one primary activity. That's not the law either. An organized group, if it also happens to be a gang, can have more than one primary activity. So my questions were designed to make sure that the jury understood and the witness' testimony was not in contradiction with that basis legal principle also

"If you have a gang, it could have either a primary activity or it could have multiple primary activities . . . .

"And so the court's questions were designed to make sure that the witness' testimony insofar as he was saying this group of people to the extent that it has some criminal activity going on, doesn't have a primary criminal activity, because it's not a gang, because all of these other things. And my only point in all of that was, is that a group or groups can have a primary activity whether or not it is or is not a gang. And then the later questions I think clarified the witness' opinion with respect to the fact that in his view this group, however organized you may think it is, um, doesn't have a primary activity because the activities that the prosecution is now relying on tend to be and are demonstrated by the evidence to be individualistic behaviors as opposed to behaviors that are gang-related or group-related."

During the course of making his objection, Justin's counsel had stated "I think the court needs to take corrective action for this before jury instructions." When the court inquired "Such as what?" counsel replied: "Well, I think at least read the primary activity portion of the jury instruction to the jury now, so they have a context for what, you know,

what the expert is going to be testifying about and why." Counsel for Anaya "join[ed] in the remarks of my colleagues." When the court ordered "bring in the jury," it inquired all defense counsel: "By the way, are all three of you asking me to provide them with that portion of the instruction [¶] . . . relating to what constitutes a criminal street gang and what the requirements are to satisfy them?" All three did so request.

The court then addressed the jury as follows:

"Ladies and gentlemen, I asked a few questions of this witness earlier, which were designed to make sure what was clarified for you, as I possibly could, that the requirements are of proof as far as what constitutes or doesn't constitute a criminal street gang, which is one of the issues you'll be deciding at the end of the case.

"I've been asked and I'm going to provide to you the definition of a criminal street gang. Now, you'll get other instructions . . . but this is the basic definition of what constitutes a criminal street gang, so you could sort of fit this in to your mental organizational structure here in terms of what the evidence is that you've already heard and evidence that you'll receive going forward. [The court then read part of CALCRIM No. 1400.]

"And that phrase, pattern of criminal gang activity, will also be more specifically defined for you later on in the case. But those are the three basic fundamental requirements of what constitutes a criminal street gang.

"So the questions I asked before were designed to identify those three separate requirements. All three of them have to be met beyond a reasonable doubt, before, in this case, the prosecution has met its burden of proving that there is a criminal street gang beyond a reasonable doubt in this case.

"You'll also have an instruction that you'll receive later on in the case and I can also provide you that instruction now.

"Nothing that I say or do is intended to influence your decision in any way or reflect my personal opinion of what the evidence is or the effect of the evidence in this particular case.

"So to the extent that you believe you've discerned some position on my part, um, there is none. I ask questions, in my view, solely for the purpose of making sure that you make and form an intelligent decision at the end of the case and make sure that you've heard all of the facts. You shouldn't interpret anything of any questions that I've asked other than that."

Justin argues the trial court was "singling out the defense expert to elicit responses helpful to the prosecution's case and implying that the defense witness was providing inaccurate or not credible testimony."

Harrison was not "singled out" by the court. The court had also directed questions at the other defense expert, Mr. De La Cruz, although the questions were fewer in number. It is clear that the court was concerned that Harrison was attempting to testify about the elements required for conviction under section 186.22. Whether Harrison was or was not "misstating" the law is beside the point. Witnesses, even experts, are not allowed to testify on legal conclusions, the application of a statute, or what satisfies the elements of a crime. (*People v. Jones* (2013) 57 Cal.4th 899, 950; *People v. Torres* (1995) 33 Cal.App.4th 37, 46; *People v. Clay* (1964) 227 Cal.App.2d 87, 98.) The court was exercising its "duty . . . to limit the introduction of evidence . . . to relevant and material matters." (§ 1044.) The point is largely moot because there is no dispute that the instruction given—at Justin's request—was a correct statement of the law. As for the court's "manner and tone" signaling the court's negative opinion of Harrison's testimony—matters that the court denied and which cannot be verified from a cold record—any harm was cured with the other instruction to the jury to disregard this and draw no conclusion. (*People v. Daugherty* (1953) 40 Cal.2d 876, 890–891; *People v. Kagan* (1968) 264 Cal.App.2d 648, 664 ["This instruction cure[s] any error that might be inherent in any of the court's comments during the trial"]; cf. *Fletcher v. State* (Tex.Ct.Crim.App. 1997) 960 S.W.2d 694, 701 ["an instruction by the judge to disregard any comment made by him is sufficient to cure any error"].)

Justin's other contention relates to the exclusion of evidence. After conducting a hearing in accordance with section 402 of the Evidence Code, the court refused to allow testimony from John Mozzetti. This is how Justin defines what was at issue:

"The defense attempted to offer John Mozzetti, the father of David Reid's former girlfriend and the mother of David's child, as a witness to and victim of an assault by David in May 2012 . . . . Mozzetti would have testified that after he observed bruises on his daughter's arms, he approached David in a Safeway parking lot to talk about what David did to his daughter. David said 'F you' and swung at Mozzetti. Mozzetti swung back and had David in a headlock when he was jumped by James Jr. David proceeded to kick him in the head and mouth. The Reids then ran to their car, popped the trunk, pulled out two driver golf clubs and began swinging at him when the police arrived. After police dissuaded him, Mozzetti decided against pressing charges. Shortly thereafter, the Reids filed a restraining order against Mozzetti.

"In addition to this, the defense also offered Mozzetti's testimony that on a date prior to his fight with David and James Jr., Mozzetti saw golf clubs in James Sr.'s trunk and when he asked, James Sr. said he did not golf but that he kept the clubs in his trunk because they have a long reach and he would have the advantage if somebody else had a bat."

The trial court ruled as follows:

"I will exclude it because this situation is too fraught with the potential for a separate trial on the merits of whether or not the Reids were or were not engaged in a 245 assault is apparent just from the evidence that I have heard, even though I have not heard from all of the parties, including the police officers.

"There are a number of facts that point to the nonexistence of a 245. This isn't a case that's been reduced [to] a conviction where there is no issue at all as to whether or not a 245 took place. It's an issue where you may have a number of witnesses all of whom would—it's kind of like . . . adding another case . . . to this case as sort of a side show trial to demonstrate that which I don't think needs to be demonstrated in terms of the evidence that I have heard. As far as this case is concerned, for example, there is no

question in this case that David Reid deliberately brought a weapon with him when returning to 43 Bay Drive. He said he did.

"With respect to James Sr. there is more of a gray area, I suppose. Although, frankly, what Mr. Bell [the prosecutor] has just conceded in his argument suggested to me that it's less of a gray area than perhaps I originally thought, that he is indicating that he is not going to dispute or argue that Mr. Reid Sr. did not strike, as far as he was concerned, the first blow. He's going to say that Mr. Reid Sr. did strike the first blow based upon his testimony. I assume that means that the first blow that he struck was with the golf club he had available to him in the car.

"So it seems to me that then changes the equation here in terms of who was or was not the aggressor in this one isolated part of the event. The isolated part being when the two Reids returned to 43 Bay Drive. If that concession is made, it seems to me then this other incident has not very much to do with anything that is relevant to this particular case.

"And, frankly, the facts of it are, even with only one witness having testified, they are not that clear because there are a number of facts that would suggest that this witness himself would have serious credibility issues and in reference to his rendition . . . of the events. He may—all of this that he said may be truthful, but there are certain aspects of his testimony that suggest that somebody would think seriously about whether or not he was truthful, including not mentioning the golf clubs to the police, being a subject himself of the long-term restraining order which apparently arose out of this incident and deciding it wasn't important enough to go to court to fight the restraining order, even though he knew about the restraining order. And so he let a long-term restraining order take place, generally speaking, the consequences of such a restraining order such that a lot of people would go to court and resist the restraining order.

"But then you have this whole history of events that take place before the Safeway parking lot event, all of these become relevant. For example, I don't know in this instance whether or not the Reids might say Mr. Mozzetti indicated on previous occasions that he was going to deal with them physically so that when he goes out of his

way to approach David Reid in the parking lot, David Reid already had some reasonable apprehension that he was going to be attacked by Mr. Mozzetti because Mr. Mozzetti indicates clearly he went out of his way to go over in the parking lot to confront David Reid.

"So then you have all of these events that preceded the confrontation in the parking lot, including Mr. Mozzetti's testimony possibly about the fact that he is angry over domestic violence having taken place, which has nothing to do with this case.

"And so all of a sudden you have this—very difficult to compartmentalize set of events in the Safeway parking lot that just goes out of control because of all of these other relevant things that may have something to do with who was the attacker, who was the aggressor, who wasn't the attacker, who wasn't the aggressor. It just turns that other set of circumstances in the tail wagging the dog. The dog being here the trial we're here to decide.

"As far as the Court is concerned the potential or time consuming distraction that this evidence would present to the jury is so great under the circumstances and now its relevance is fairly minimum [*sic*: minimal]. Under Evidence Code 352, it's going to be excluded."

In seeking to have this ruling overturned, Justin and Anaya acknowledge that the trial court was exercising the discretion granted it by Evidence Code section 352 and they must therefore satisfy the demanding abuse of discretion standard. "A trial court's discretionary ruling under this statute ' "must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." ' " (*People v. Williams* (2008) 43 Cal.4th 584, 634–635.)

Nothing like reversible abuse appears here. Although Mozzetti's proposed testimony does appear to have been relevant to the defendants' theory of self-defense (see *People v. Minifie* (1996) 13 Cal.4th 1055, 1064–1065 and authorities cited), the court explained in considerable detail what could be the collateral impacts of admitting that testimony. James Sr.'s access to a golf club, and his willingness to use it as a weapon

was a legitimate inference, but this was not a contested point, as the court noted, because it was already before the jury in the form of James Sr.'s own testimony that he went into the affray with a golf club. The same was also true of the defense theory concerning David's participation with James Sr. in initiating the fight. The ruling occurred near the end of a trial with multiple defendants, multiple victims, and a mass of conflicting testimony about the alleged offenses. The court fully explained why it believed the potential disruptive consequences of admitting Mozzetti's testimony outweighed its relevance. No real attempt is made in the briefs to demonstrate how that reasoning was defective.

"[A]n appellant who seeks reversal must demonstrate that the trial court's decision was irrational or arbitrary. It is not enough to show that reasonable people might disagree . . . . Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance." (*People v. Myers* (1999) 69 Cal.App.4th 305, 309–310.) At best, Justin shows only that admitting Mozzetti's testimony might also have been a reasonable ruling. That is not enough.

**DISPOSITION**

The judgments of conviction are affirmed.

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Richman, J.

We concur:

_____
Kline, P. J.

_____
Stewart, J.